Washington Law Review

Volume 28
Number 4 *Annual Meeting of the Washington State Bar Association*

11-1-1953

The Function of the Courts in Maintaining Constitutional Government, and Individual Rights and Freedoms

Orie L. Phillips

I have been very proud to be a judge, and I am very privileged to speak to you today, but I can say to you truthfully that I think the proudest moment that I ever had in my life was after my admission to the Bar and the first time that I had a chance to answer when somebody said to me, "Well, what's your business, Mr. James?" I said, "I'm a lawyer," and I'm still proud to be able to say that.

The Function of the Courts in Maintaining Constitutional Government, and Individual Rights and Freedoms

An Address by the Honorable Orie L. Phillips, Chief Judge of the United States Court of Appeals, Tenth Circuit

For the privilege and honor of being permitted to address you on this occasion I express my deep appreciation.

I have had the privilege of meeting some wonderful people. I am very happy to come back to the State where two distinguished members of your Bar live, with whom I have had the privilege of working for many years, primarily in the American Bar Association, and with whom I have formed very intimate and lasting friendships, which I shall always cherish.

The men to whom I refer are Frank Holman and Al Schweppe.

I am glad that your president indicated that I was appointed back in 1923 to the Federal Bench in New Mexico, because one of your distinguished members asked me at the luncheon today, "Who appointed you? Roosevelt or Truman?" Well, since I am a member of a species—Republican federal judges—which until the recent event of 1952 in November promised us a change, was rapidly approaching extinction, I want to be numbered among those who were appointed before the New Deal. I don't belong to that crowd.

I don't want to become partisan, but I don't want to fly under any false colors either.

Now, my friends, we are living in serious times and in a sorely troubled world. I trust, therefore, that you will bear with me in my efforts to discuss with you a serious, but what I believe to be an important and timely subject, namely, the function of the courts in maintaining constitutional government and individual rights and freedoms.

Constitutional government and individual liberty are cornerstones of the American way of life. They are vital issues in the world-wide struggle between freedom-loving nations and the police states. This

conflict involves two opposing and irreconcilable ideologies. One champions and the other repudiates constitutional government and individual liberty One recognizes the dignity of man and his inalienable natural rights and freedoms, the other stands for the all-powerful state in which the individual is a mere cog in the machine.

Man develops his finest attributes of character and personality, performs his greatest achievements, and attains his highest aspirations only when he lives in an environment of individual freedom and ordered liberty under law, and discharges the responsibilities and performs the duties that devolve upon men living in a free society

At a time when totalitarianism dominates vast areas of the world, the maintenance of constitutional government and the preservation of our individual rights and freedoms are of transcendent importance. Therefore, it seems to me to be fitting and proper to undertake to restate and re-emphasize the function of the courts in maintaining these bulwarks of the American Way of Life.

Nothing that I shall say will perhaps be new, but perhaps it will be justified, nevertheless, to restate some of these fundamental things.

What is the function of the courts in maintaining constitutional government? The historic decision of the Supreme Court of the United States in the Steel Seizure Cases, affirming the ruling of Judge Pine, which directed the return of the steel industry to its owners, dramatically focused the nation's attention on this important function.

Constitutional government is "a government of laws and not of men."

That concept is a rejection in positive terms of the rule by fiat, whether by the fiat of government or of private power.

Constitutional government involves three essential principles. It must be representative; it must provide safeguards protecting the rights and liberties of minorities and individuals; it must be one of delegated and limited powers; and in our country it involves the maintenance of that delicate and essential balance between Federal and State power to the end that the rights of the states and local self-government shall be preserved.

The powers of our Federal government should be limited to matters that are national in scope and character, and matters which are essentially local in character should be preserved to the states and the people, with the power to deal with them in the light of peculiar local conditions and problems which differ widely throughout the various

sections of our great country. In a country as vast as ours, with varying local conditions and problems, the expansion of Federal power with respect to matters not national in scope and character means inefficiency in administration, extravagance in the expenditures of public funds, and an expansion of bureaucracy with its tendency to become a rule of men rather than of law, to promulgate a maze of rules and regulations, without regard, and, in many instances, unsuited to local conditions and problems, and to become arbitrary and tyrannical in the administration and in the enforcement of such rules and regulations.

Our national government is divided into three departments, under which Congress is endowed with power to make laws, the President with the power to execute the laws and the Courts with the power to construe and apply the laws and to determine their constitutionality.

In his famous dissent in *Myers v. United States,* Mr. Justice Brandeis said:

"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy"

Our Federal Constitution was framed against the background of a "continuous controversy over the royal prerogative in England of the seventeenth century."

Counsel for the steel companies in their brief in the Steel Seizure Cases said:

"The present claim of the Executive to an inherent right to do whatever he considers necessary for what he views as the common good—without consulting the legislature and without any authority under law is not a new claim. It is precisely that which was made more than three centuries ago by James I of England when he claimed for himself the right to make law by proclamation and asserted that it was treason to maintain that the King was under the law. It is precisely the claim for which Charles I lost his life and James II his throne.***It is precisely the claim for which George III lost his American colonies. In short, it was the continued effort of the English Crown to exercise unfettered prerogative that culminated in the War of Independence and the establishment of the United States under the form of government provided in the Constitution."

It was the passage of the English Bill of Rights in 1688 that established finally that the Crown was under the law Preceding the American Revolution the colonists had their own struggle with George III

and his ministers. During that struggle they "appealed constantly to their fundamental rights as Englishmen which had been bestowed by Magna Carta and the English Bill of Rights."

May I quote again from the plaintiffs' brief in the Steel Seizure Cases:

"It was against this background that the Founding Fathers drafted our Constitution. The constitutional debates***reveal with graphic clarity that the delegates had firmly in mind the recent excesses of the English Crown against the Colonies and the long and costly struggle that had been waged by the people of England***before the royal power had been circumscribed and placed under the law"

What then is the function of the courts in maintaining this constitutional framework? The Constitution affords no clear-cut and definite answer. Article III provides that:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

While the ordinances of the Constitution do not establish and divide fields of black and white, paraphrasing the words of Justice Holmes, and while the framers of the Constitution refrained from particularity, perhaps out of a nicety of wisdom, still, there is no doubt of the power of the court to pass upon the constitutionality of statutes, state and national, and of executive action.

Chief Justice Stone wrote in "Law and Its Administration," published in 1915, that "A study of the Federal Constitution and the conditions leading to its enactment" leaves "no reasonable doubt that the doctrine of *Marbury v. Madison,* 1 Cranch, 137, is legally and historically sound" and in that famous case Chief Justice Marshall established the duty of the courts to review action of the government and to keep it within constitutional bounds, and that great biographer of the early Chief Justice, Albert J Beveridge, said in his life of John Marshall, that Marshall thus "set up a landmark in American history so high that all the future could take bearing from it, so enduring that all the shocks the nation was to endure could not overturn it."

And again in 1929, we find Chief Justice Stone saying·

"The history of the judicial function before the adoption of the Constitution, the language of the Constitution itself in Article VI and the long arm of judicial decision, leaves that question no longer debatable."

Finally on another occasion he said:

"To have formulated in written language a separation of governmental powers into state and national with specific limitations upon each, as the supreme law of the land, and to have denied to the courts the power to apply that law in the settlement of controversies pending before them, would have been not only contrary to the experience of the colonies but would have involved the performance of the functions of government in confusion and in conflicts of authority which would have imperiled the success of the great experiment."

In his work "The Science of Government," the late President Woodrow Wilson said:

"It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights, there the government must accept definition of its authority There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional power of the courts constitutes the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."

But, Chief Justice Stone cautioned that the power of judicial review "brought the judicial function a task of peculiar gravity and delicacy," and in his dissent in *United States v. Butler* he pointed out two guiding principles of decision:

"One is that the courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

Our courts thus exercise tremendous power and a grave responsibility in maintaining our constitutional government. The recent exercise of

this power in the Steel Seizure Cases is enduring proof thereof. The nation eagerly awaited the decision, those in authority respectfully accepted the Court's mandate. The decision will long stand as an important landmark of constitutional limitation on the exercise of governmental power.

The Executive, in an hour of great crisis, was prevented from seizing the steel industry, from establishing a precedent that would afford a basis for further and greater invasions of individual freedom. The President had based his action on the war powers, declaring that an "emergency" existed and that he was the "steward" of the general welfare. Significant are the words of Mr. Justice Douglas in his concurring opinion. He said, "All executive power from the reign of ancient kings to the rule of modern dictators has the outward appearance of efficiency," and Mr. Justice Jackson reminded us that "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions," he said, "may be destined to pass away But it is the duty of the Court to be last, not first, to give them up."

The Court has performed its function with consummate skill and wise restraint, with "knowledge and wisdom and self-discipline."

The Court early recognized that the Constitution is a living document. In *McCulloch v. Maryland,* Chief Justice Marshall said that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." But I say that neither change, increasing complexity in our social fabric, nor national or international crises create any constitutional basis, either for the relaxation of constitutional limitations, the impairment or destruction of our free institutions, the deprivation of our fundamental individual rights and liberties, or the breaking down either of the system of checks and balances and of separation of powers in the national government or of the essential and delicate balance between the powers of the central government and the reserved powers of the states.

The function of the courts in maintaining constitutional government, exercised with knowledge and wisdom and self-discipline, is our best insurance of its preservation and our strongest bulwark against its destruction. May the words of Mr. Justice Jackson ring down through the centuries to come and ever be true, "Such institutions may be

destined to pass away. But it is the duty of the Court to be last, not first, to give them up."

May I now turn to the function of the courts in maintaining individual rights and freedoms.

First, what are these rights and freedoms? In its strictest sense, a constitutional democracy is a form of government in which the supreme political authority is retained by the people and exercised directly as in a pure democracy, or indirectly as in a representative republic. But to us, the term connotes much more than that. It involves social as well as political concepts. It is even more than an ideology; it is a way of life. It rests on the postulate that supreme political authority is vested in the people, and that governments derive their just powers from the consent of the governed. It exalts the individual more than the state. It regards the citizen as master and the public official or governmental agent as the servant. Under it, the state exists for the benefit of the citizen rather than the citizen for the benefit of the state. In these aspects it is the antithesis of totalitarianism under which the state is supreme and the individual a mere cog in a machine. Totalitarianism denies the right of the individual to think freely, to engage in free enterprise, to enjoy personal liberty, and to work out his own destiny, and under it there is a regimentation of human beings where everyone's thought, everyone's time, everyone's labor, and, at last, everyone's life, are at the disposal of the supreme authority, commonly called a dictator.

Under our system, the Constitution is the supreme law of the land, binding on the people and on the officers and agents of government alike. In Italy under Mussolini the supreme law was the hopes and aspirations of the tireless brain of that tyrant. In Germany under Hitler the supreme law was his ruthless ambitions and insatiable desires. In Russia today the supreme law is the iron will of Malenkov. The outstanding characteristics of such governmental systems are the repressions and restraints they place upon the people and the broad powers exercised by the rulers. The virtue of our system is the restraint and limitations it places upon the agents of government and the freedom it secures to the individual.

We recognize that there are certain natural and inalienable rights, the right to life, liberty and the pursuit of happiness, which no government can take from us; and under our Constitutions, state and

national, these rights are carefully safeguarded. Liberty means many things, among others, the right to worship God according to the dictates of our own conscience and without interference either by our fellow citizens or by government; the right of peaceable assembly; the right to petition for redress of grievances; the right to search for the truth, or intellectual freedom, the right to freedom of expression, to state our views orally or in writing; the right to acquire, hold and enjoy private property; the right to marry and to nurture, bring up, and educate our children, the right to engage in any lawful trade, calling, business or profession, the right to the fruits of our labor; the right of laborers to organize and to bargain collectively respecting wages, hours and working conditions, but these rights are not absolute. Liberty is not unbridled will. Democracy implies the existence of an organized society maintaining public order, without which liberty would be lost in the excesses of unrestrained abuses. And so, these individual liberties are subject to reasonable regulation for the public welfare. And, therefore, a democracy in America connotes an ordered liberty under law That concept is a happy medium between two extremes. Always in civil society, two desires, which in a degree are in conflict, strive for supremacy One is the desire of the individual to control and regulate his own actions in such a way as to promote what he conceives to be for his own good and advantage, and the other is the desire of the whole to control the actions of the individual in such a way as to promote what it conceives to be for the common good or general welfare. The realization of the desire of the individual is personal liberty, and the effectuation of the desire of the whole is authority When the pendulum swings too far toward the rights of the individual, liberty degenerates into license and anarchy When it swings too far the other way, authority becomes tyrannical. A nice balance, therefore, between the two is the end a constitutional democracy seeks to attain.

Our conception of democracy embraces judicial establishments and administrative tribunals for the protection, vindication and enforcement of rights and the redress of grievances, judicial establishments presided over by judges who are able, conscientious, fearless, honest and just, where the humblest citizen may resort when his life, his liberty, or his property is threatened, where he may have the aid of competent counsel and where to everyone, according to the righteous-

ness of his cause, justice under law shall be administered with expedition, certainty and equality.

Democracy in America also connotes a judiciary endowed with substantial and independent powers, secure against all corrupting or perverting influences and secure also against the arbitrary authority of the administrative heads of government. It connotes a legal system based on natural justice and practical common sense which opposes reason to passion, accepted principles to unbridled discretion, and the requirements of fair play to arbitrary power.

Another underlying principle of our governmental system is an organized society under a government of laws and not of men. That is to say, that the rules of social conduct shall be prescribed by legislative enactment within constitutional limitations and by judicial pronouncements in accordance with settled principles, which, through long years of experience, have come to be established as just, fair and reasonable for determining the respective rights, the duties and the obligations of men, and for the regulation of their conduct in a free society; and that the individual shall be held to answer for his conduct in accordance with those rules and not by such rule or standard as a particular official or tribunal may personally see fit to apply.

No function more important, no duty more sacred devolves upon the courts than the function and duty to preserve and safeguard these rights and freedoms of the individual and to maintain that delicate balance between governmental authority and individual freedom to the end that there shall be ordered liberty under law.

From time to time throughout our history the Supreme Court has been subjected to criticism, sometimes bitter criticism. The present Court has not been free from such polemics. But today, perhaps more so than at any time in our history, the Court manifests a consciousness of its power and its sacred duty to preserve and safeguard the fundamental rights and freedoms of the individual and to maintain that delicate balance between individual freedom and governmental authority which is the essence of ordered liberty under law

Report of the Resolutions Committee

By Richard S. Munter

There were submitted to the Resolutions Committee pursuant to the by-laws of the Association two resolutions.